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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-509

THE SINGER COMPANY,

Petitioner,

against

PERMA RESEARCH & DEVELOPMENT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JUSTIN N. FELDMAN
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036

Attorney for Respondent

Of Counsel:
BARBARA A. LEE

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Argument

In this diversity action for breach of contract, no substantive question of federal law is presented. The only issues on appeal to the United States Court of Appeals for the Second Circuit were whether the trial court's findings were supported by substantial evidence, and whether Petitioner was prejudiced by certain evidentiary rulings. The judgment having been affirmed, Petitioner now seeks review

by this Court of the Court of Appeals' holding (a) that the trial court did not abuse its discretion in receiving certain computer-generated evidence which formed one of the bases for the opinion of one of plaintiff's expert witnesses (Appendix J, p. 136a) and (b) that Petitioner did not show "that it did not have an adequate basis on which to cross-examine plaintiff's experts" (*Id.*, p. 137a). Although Petitioner sought review of that decision by the entire bench of the Second Circuit on the same grounds here relied on, no judge of that Court thought that the decision in this case created a "compelling need for proper standards" to be established for admissibility of "computerized evidence" in that Circuit, as Petitioner now urges this Court to do for all Circuits.[1] In view of the questions presented to the Second Circuit and its disposition of them, it is apparent that none of the "special and important reasons" for this Court to grant *certiorari* is present.

I

Petitioner seeks review of an abstract question not decided by the court below.

The holding of the Court of Appeals on the issue now presented for this Court's review was carefully limited to the facts of this case. Mr. Justice Clark, writing for the majority, expressed it as follows:

> "While it might have been better practice for opposing counsel to arrange for the delivery of all details of the underlying data and theorems employed in these simulations in advance of trial in order to avoid unnecessarily belabored discussion of highly technical, tangential issues at trial, Fed. R. Civ. P. 26(b)(4)(A), *the trial judge did not abuse his discretion in allowing the experts to testify* as to this particular basis for their ultimate conclusion that the Perma device was indeed perfectible. While delivery of the actual computer programs would not appear to serve much purpose apart from delivery of the data and scientific formulae employed, the production of such programs in advance of trial with suitable protective orders to protect truly proprietary aspects of the programs also would have been better practice. *On the record before us, however, we hold that Singer has not shown* that it did not have an adequate basis on which to cross-examine plaintiff's experts."

(Appendix J, pp. 136a-137a, emphasis added.) The quoted passage is the entire text of the Court of Appeals' ruling on the issue this Court is now asked to review. Nowhere did it hold, as Petitioner contends

> "(a) that disclosure of computer programs, admittedly containing the 'data and scientific formulae employed', is not a required foundation for admission of the results of computer simulations; and (b) that disclosure of computer programs is not necessary to effective cross-examination of witnesses stating the results of computer simulations".

(Pet. 5). In the absence of any such broad holding, Petitioner's suggestion that this Court use this case as a vehicle for setting "Basic Standards" for the "Proper Administration of Justice" with respect to the admissibility of computer-generated evidence (Pet. 6) is, then, nothing more than a request for this Court to decide an "abstract, hypothetical or contingent question," which we respectfully submit that the Court should decline to entertain for the rea-

1. Petition for Certiorari (hereinafter "Pet."), p. 6.

sons set forth in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 283-84 (1969).

Even if the abstract question this Court is asked to review had been decided by the court below, it would still be inappropriate for review on *certiorari*, for neither of Petitioner's two "Reasons for Granting the Writ" survive analysis.

II

This case presents no important question of federal law.

Although the Petition is replete with references to "the magic world of computerization" (Pet. 5) and to all the many kinds of errors which may theoretically appear in computer-generated evidence (Pet. 6), there is no "magic" here involved. A computer program, as Petitioner itself acknowledges, is nothing more than the set of step-by-step directions which triggers the mechanical operations a computer performs on the data fed into it.[2] Here, Petitioner was furnished with all of the substantive information from which the mechanical operations performed by the computer could readily have been reconstructed; its complaint that those operations should also have been embodied in and formally produced in the form of a single convenient document or thing is thus nothing more than a formal objection, altogether without substance. All of the information Petitioner needed to attack the reliability of the com-

2. See Pet. 8, quoting Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law*, 71 YALE L.J. 239, 243 (1961) and Note, 40 BKLYN. L. REV. 116, 117 (1973).

puter simulations was furnished. All of the computer input—the data and scientific formulas employed in the simulations—was in evidence, and the expert witness who was the author of the program testified in open court as to the assumptions and decisions reflected in the program, and the reasons for them. Petitioner's experts thus had all the information necessary to write their own program; if their results—computer output—had then differed from those offered in evidence by Respondent, no further "foundation" would have been necessary to attack the reliability of Respondent's computer-generated evidence.[3] Mr. Justice Clark's observation that "delivery" of the program would have served little additional purpose although pretrial "production . . . would have been better practice" (Appendix J, p. 137a), is, therefore, hardly as "astonishing " as it seems to Petitioner (Pet. 11), but simply a further indication that the decision in this case was limited to its own facts.

Petitioner's argument that this case presents an important question of law (nowhere precisely defined in the Peti-

3. Petitioner did not elect to certify any portion of the record pursuant to this Court's Rule 21(1) prior to filing herein. Respondent has accordingly, pursuant to that Rule, requested the Clerk of the Court of Appeals for the Second Circuit to certify and transmit to this Court the portions of the record cited in this Brief. The relevant portion of the cross-examination of Petitioner's expert DeVilliers, the author of the program, appears at Tr. 3067-86 and 3712-3891. The input information, from which Petitioner's experts could have duplicated the simulation had they elected to do so appears in Plaintiff's Exhibits 23, 132, 133, 133A, 134, 135, 142 and 143 and Tr. 2964-70, 2984-88, 3014, 3926-27. Petitioner in fact retained an expert for this purpose (Tr. 7932) during a three-week recess that interrupted the cross-examination of DeVilliers (Tr. 3091, 3712). Thereafter it abandoned this strategy, for reasons never explained on the record (Tr. 7932), giving rise to the inescapable inference that the results obtained by Petitioner's expert did nothing to contradict those offered in evidence by Respondent.

tion) relies heavily on a statement in the dissenting opinion below which is itself factually inaccurate:

> "Because the record in this case contains no information about the programming relied upon by plaintiff's experts, neither we nor defense counsel have any way of knowing whether it was complete or accurate."

(Appendix J, p. 161a, quoted in Pet. 10). The record abounds, however, in such information. Petitioner had the opportunity to cross-examine the expert who did the actual programming, and questioned him in exhaustive detail about the logical and analytical assumptions underlying the computer program, the reasons for them, and the extent to which the program simulated particular features of the anti-skid device.[4] The computer input was not only in evidence but some of it was derived from and published in standard university textbooks.[5] The record in this case thus clearly supports the Court of Appeals' holding that Petitioner has not shown that it did not have an adequate basis on which to cross-examine Respondent's experts (Appendix J, p. 137a).

Petitioner's reliance on the dissenting judge's view that "[Respondent's] entire case rests upon the accuracy of its computerized calculations" (Pet. 3, quoting Appendix J, p. 162a) is equally misplaced. The majority of the Court of Appeals understood and said that the simulation was but one basis for the opinion of Respondent's experts; as Mr. Justice Clark put it:

> "the trial judge did not abuse his discretion in allowing the experts to testify *as to this particular basis* for their

4. Tr. 3067-86, 3712-3875.

5. Tr. 2967, 2906.

> ultimate conclusion that the Perma device was indeed perfectible."

(Appendix J, pp. 136a-37a, emphasis added.) Respondent's principal expert witness based his opinion upon, among other things, the patents relating to the anti-skid device; diagrams, schematic drawings and models of the device and its various components, including proposed "fail-safe" modifications; documents relating to Petitioner's specific criticisms of the device,[6] and reports relating to empirical tests of the device,[7] as well as on the simulations which were separately authenticated by the programmer. The trial court's finding that the Perma anti-skid device was perfectible was expressly based upon "all of the evidence" (Appendix G, p. 83a).

Respondent's "important question of law" is, then, nothing more than the difference between the dissenting judge's view of the record below and that of the majority, expressed in the language of Mr. Justice Clark which we have quoted above, pp. 2-3. The very nature of this difference clearly demonstrates the factual nature of the controversy this Court is now asked to review. All that was decided here was an issue committed to the trial court's discretion, of the type which this Court has consistently declined to review, *e.g., United States v. Nobles,* 422 U.S. 225, 242 (1975); *Moor v. Texas & New Orleans R.R.,* 297 U.S. 101, 105 (1936). The precise question on which that discretion was exercised—admission of expert testimony based in part on computer-generated evidence without ordering pro-

6. Tr. 2451-55.

7. Tr. 2467, 2478; PX 19, 21; DX 12; Tr. 354. *See also* Appendix G, p. 124a.

duction of the computer program—is hardly of sufficiently far-reaching importance to warrant consideration by this Court, much less the broad prospective rule-making in which Petitioner asks the Court to indulge.

Only one case appears to have presented the precise question here involved, admissibility of evidence produced by "a computer . . . programmed to produce evidence specifically for trial" (Pet. 8). In *United States v. Dioguardi*, 428 F. 2d 1033 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970), the Second Circuit severely criticized the prosecution's use of computer-generated evidence without having furnished the program to the defense, but held, as it did here, that, on the record before it there was no prejudice, because the defense had ample other means for attacking the computer-generated evidence.[8] Thus the rarity with which the precise question presented in this case and the *Dioguardi* case has arisen further refutes Petitioner's claim that an important question of law is somewhere lurking in those two discretionary rulings. This obvious lack of urgency is not overcome by Petitioner's prediction that "computers will be increasingly used to provide evidence in trials." (Pet. 6). There is nothing in this case, or in the Petition, to suggest that existing evidentiary and procedural rules are not sufficiently flexible to respond to such a situation.

8. The unreported ruling of a District Court on pre-trial discovery motions in *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, No. 71-H-778A (S.D. Tex. filed May 3, 1976), also cited by Petitioner, is irrelevant. The program relating to the computer-generated evidence in that case had already been produced voluntarily (in contrast to the present case, no issue as to its proprietary character appears to have been involved), and the District Court's opinion dealt with the extent to which defendant would be permitted to depose plaintiff's non-trial experts pursuant to FED. R. CIV. P. 26(b)(4)(B).

III

There is no conflict with decisions in other Circuits.

Petitioner next argues that the decision below "conflicts with decisions of other courts of appeal" which it characterizes as holding that disclosure of the computer program is necessary (1) "as a proper foundation for computer-generated evidence" and (2) "for meaningful cross-examination" (Pet. 10). In fact, no case in any Circuit has required production of a computer program for either purpose.

Three Courts of Appeals cases are cited in support of Petitioner's "foundation" argument.[9] *United States v. Liebert*, 519 F.2d 542, 547 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975), dealt only with pre-trial discovery, in connection with which the Court of Appeals observed by way of dictum that

> "The introduction of a computer printout is admissible in a criminal trial provided that the party offering the computer information lays a foundation sufficient to warrant a finding that such information is trustworthy and the opposing party is given the same opportunity to inquire into the accuracy of the computer and its

9. *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, discussed above, p. 8, is also cited for this proposition (Pet. 11). Since the motions before the District Court in that case dealt with the scope of pre-trial discovery of adverse experts, the foundation to be required for their evidence if the case ever came to trial was not in issue. Even if it were, that would hardly be a "special and important reason" for this Court to review the decision of the Second Circuit in this case. It is not the purpose of *certiorari* to afford an opportunity to reconcile appellate decisions with those of every court of inferior jurisdiction in the federal system.

input procedures as he has to inquire into the accuracy of written business records."

Neither the nature of the foundation required nor the relevance of the computer program thereto is discussed. In both *United States v. Russo,* 480 F.2d 1228 (6th Cir. 1973), *cert. denied,* 414 U.S. 1157 (1974), and *United States v. DeGeorgia,* 420 F.2d 889 (9th Cir. 1969), computer evidence was in fact received without production of the program, and, as in the present case, the weight of the computer evidence was explored by cross-examination of live expert witnesses about the procedures employed. In *Russo,* the Court of Appeals for the Sixth Circuit held that an adequate foundation was laid for the admissibility of summaries of computer printouts where qualified experts testified —exactly as the programmer did here—as to the accuracy of the input and "the nature of the information which went into the machine and upon which its printout was based," 480 F.2d at 1241. In *DeGeorgia,* although the Government "presented foundation evidence as to input procedures used," the Court of Appeals expressly declined to pass upon the adequacy of the foundation, 420 F.2d at 893, note 11.[10]

Petitioner's "foundation" argument, then, is based exclusively on cases in which computer-generated evidence was received *without* production of the program; far from demonstrating a conflict in the Circuits, these cases are entirely consistent with the ruling below.

10. The concurring opinion of Judge Ely, which Petitioner cites separately as in "conflict" with the decision herein, discusses foundation requirements in some detail, yet nowhere says that laying a foundation requires production of a program.

Petitioner's "meaningful cross-examination" argument is equally fanciful. In the face of Mr. Justice Clark's unambiguous finding that petitioner "has not shown that it did not have an adequate basis on which to cross-examine plaintiff's experts," (which Petitioner characterizes as "sophistry" (Pet. 12)), Petitioner asks this Court to impose an inflexible black-letter rule that delivery or production of a computer program should be an absolute prerequisite to the admissibility of computer-generated evidence. In support of this argument, it makes the bald statement that the Second Circuit's decision herein "is in conflict with other Federal Courts which have found that disclosure of the information contained in computer programs is necessary to cross-examination" (Pet. 14). No case has in fact so held.

Petitioner's only authority for this proposition is a partial quotation from *United States v. Liebert,* 519 F.2d 542, 550 (3d Cir.), *cert. denied,* 423 U.S. 985 (1975) (Pet. 14), which not only is not in point, but when read in context lends considerable support to the opposite conclusion. In that case, defendant was accused of failure to file income tax returns, and the Government intended to rely at trial primarily on evidence that its computer contained no record of such filings. Defendant sought production of the Internal Revenue Service's "nonfiling lists"—computer *output* —which he hoped to show included taxpayers who had in fact filed, as he contended he had done. The Court of Appeals upheld the Government's refusal to produce the lists on the ground that there was no need to invade the privacy of third persons as long as there were reasonable alternative means of challenging the Government's computer evidence. The five alternative means that the Government

offered are described at length in the Court of Appeals opinion, 519 F.2d at 550, and did not include production of a computer program. "Such alternatives," the Court observed in the sentence which Petitioner quotes only in part, "should provide Liebert with the information necessary to cross-examine the computer testimony confronting him by analyzing the reliability of the computer system in theory and checking the accuracy of the system in fact."

This is a far cry from holding expert testimony inadmissible at trial because the proprietary program is not produced. Mr. Justice Clark's finding that Petitioner was not prejudiced here is amply supported by the record showing full cross-examination of the programmer. It is the logic by which Petitioner now suggests that it should also have been allowed to cross-examine "the computer and its program" (Pet. 13) which is "sophistry," not the finding of Mr. Justice Clark.

Conclusion

The decision below was correct and is based upon its own special facts. It presents a very narrow question, and there is no reason for review by this Court. *Certiorari* should be denied.

Respectfully submitted,

JUSTIN N. FELDMAN
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036

Attorney for Respondent

Of Counsel:
BARBARA A. LEE

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